Nos. 26 and 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 26

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.
Respondents.

No. 30

JAMES J. SAXON, Comptroller of the Currency,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.
Respondents.

BRIEF FOR AMICUS CURIAE INDEPENDENT BANKERS ASSOCIATION

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INTEREST OF AMICUS CURIAE

This brief of *Amicus Curiae* is filed pursuant to Rule 42 of this Court with the consent of all parties herein. (See Appendix A.)

The Independent Bankers Association was formed 34 years ago and its membership now consists of about

6,300 national and state banks in 40 states, 91 members being in Louisiana.

One of the prime purposes of the Association, and the reason for which it was organized, is to promote and preserve competition in the field of banking and to oppose efforts at concentration of banking power which threaten to lessen or destroy competition.

Amicus is necessarily interested in the issues involved in this case because its member banks will be adversely affected if the Whitney plan to evade Section 36c of the National Bank Act is allowed to succeed. *Amicus* submits that the Whitney plan and the proposed act of the Comptroller of the Currency are clearly violative of the National Bank Act. *Amicus* is particularly concerned because of Whitney's and the Comptroller's attempt to justify this evasion of federal law on the grounds that such evasion is not only permitted but specifically contemplated under the Bank Holding Company Act of 1956.

The Independent Bankers Association sponsored the Bank Holding Company Act of 1956 (70 Stat. 133-138, 12 U.S.C. §§ 1841-1847) and for 14 years urged its adoption by Congress. It has observed and participated in the application of this Act in many situations since it became effective, and is familiar with its practical operation. It views the Act as part of the body of antitrust law because it was designed to place restraints upon the use of the bank holding company device as a means of rapid concentration of control of sources of commercial credit. The Act was not intended to grant new powers to banks, as petitioners seem to infer, but to control a device increasingly used to circumvent states' restrictions upon

branch banking. It was meant to control artificial growth of banking power through acquisitions of banks into a single control, thus reducing the number of alternate sources of credit available to borrowers.

Amicus will demonstrate to the Court that the scheme used in the instant case is a patently perverse use by the Comptroller of the authority and discretion vested in him by the National Bank Act. It was conceived by unlawful means, was designed to circumvent federal and state branch banking laws, and in operation would violate a state prohibitory statute. Judicial approval of the Whitney scheme will be tantamount to an open-door policy to large metropolitan banks to create holding companies by use of their own funds in "bootstrap" arrangements designed to nullify the effect of state banking laws.

STATEMENT OF THE CASE AND STATUTES INVOLVED

For the purpose of this brief, *Amicus Curiae* adopts the statement of facts contained in the opinions of the courts below (R. 444-448 and 455-465, 470-476), and in the brief of respondent banks herein. The principal statutes involved are set forth verbatim in Appendix A to the briefs filed in this court by Petitioner Saxon and Petitioner Whitney-Jefferson.

SUMMARY OF ARGUMENT

I

Amicus fully adopts the arguments of the respondents that the establishment of a holding company system by Whitney National Bank of New Orleans (hereafter Whitney-New Orleans) by the use of its own capital funds—for the express purpose of evading

Louisiana's branch banking laws—violates Section 36 (c) of the National Bank Act. (12 U.S.C. § 36(c)).

II

1. Realizing that Section 1003 (5) of the Louisiana statute (L.R.S. § 6: 1003 (5)) operates as an absolute bar to the Whitney holding company scheme, the petitioners assert that this section offends the Supremacy Clause of the Constitution of the United States. They contend that federal banking legislation has preempted the field of the chartering and organization of national banks. However, Section 7 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1846, specifically reserves to each state the "powers and jurisdiction which it now has." Several states had statutes *prohibiting* bank holding companies at the time the Bank Holding Company Act was passed. Senator Robertson, the Chairman of the Senate Banking and Currency Committee and sponsor of the Act, in explaining the provisions of the Act on the Senate floor, read into the Congressional Record a Georgia statute as an example of the jurisdiction a state "now has." This Georgia statute forbade any expansion of a bank holding company system beyond two banks; thus it directly affected the organization and chartering of national banks. The legislative history of Section 7 leaves no doubt as to its scope; a state was to have the right to be "more restrictive" and "more severe" on bank holding companies as a class than could the federal authorities under the Act. *S. Rep.* No., 1095, 84th Cong. 2d Sess., Vol. 2, 1956 *Code Cong. & Admin. News*, 2492. This interpretation of Section 7 is reinforced when Section 11 of the same act is read with it; Section 11 states that nothing in the Act is to be con-

strued as approval for conduct "in violation of existing law." The Louisiana statute does not frustrate federal law; it comports with the overriding policy of federal banking legislation which is accommodation to state regulation in the same field.

2. Likewise Section 1003 (5) does not violate the Fourteenth Amendment. The statute does not constitute special legislation; it extends to the whole class of bank holding companies and applies equally to any holding company that may be established in the state. It has been clear since *Munn* v. *Illinois,* 94 U.S. 113, 132, that states have the power to legislate against commercial abuses they believe to be injurious to their internal business affairs. It is not unreasonable for Louisiana to determine that the bank holding system threatens competition in banking and thus is against the public interest of that state. Having made its policy determination against holding companies, Louisiana had the right to put its decision into effect immediately. Any injury to Whitney-Jefferson is only an incidental effect of the policy determination Louisiana made against all bank holding companies.

III

Amicus fears that approval of the instant scheme will violate two long standing federal banking policies: (a) to maintain competitive equality between national and state banks, and (b) to preserve competition and restrain concentration in the field of banking. The central issue here is whether a holding company system is to be born contrary to the wishes of the people of Louisiana and contrary to a federal and state statutory program which has for decades recognized that the people in each state are best able to

judge the type of banking structure suitable to their economic needs. There is presently a delicately balanced accommodation of federal and state banking laws which permits national and state banks to operate side by side and to compete on an equal plane. It has been consistent federal policy that the two *systems* should not be brought to the point of vying with each other for supremacy and that the "dual-banking" system should be preserved. Approval of the Whitney scheme would be a blow to this policy of accommodation between federal and state banking regulation.

ARGUMENT

I. THE ESTABLISHMENT OF A HOLDING COMPANY SYSTEM BY THE USE OF THE CAPITAL FUNDS OF A NATIONAL BANK, FOR THE EXPRESS PURPOSE OF EVADING STATE BRANCH BANKING LAWS, VIOLATES SEC. 36(c) OF THE NATIONAL BANK ACT.

In the words of the Court of Appeals below:

> There was actually no pretense about the matter: Whitney of New Orleans frankly proposed to evade the statutes by establishing through the holding company arrangement an office in east Jefferson Parish which it would manage and control. (R. 470)

The essential and undisputed facts surrounding the entire Whitney plan have been clearly set forth by the Court of Appeals in the instant case and by respondent banks in their brief. *Amicus* wholly adopts the arguments of respondents and the conclusions of the Court of Appeals that the Whitney scheme is violative of Section 36(c) of the National Bank Act.

Petitioners throughout the course of this litigation have attempted to convey the impression that the role played by the Comptroller in the Whitney "plan of

reorganization" was routine and consistent with the normal procedures incident to the formation and chartering of a new national bank. Without unnecessary repetition of the arguments already made by respondents, *Amicus* would like to demonstrate to the Court the unusual and unique character of the Comptroller's involvement in the Whitney scheme, which involvement is by no means normal or routine. The Petitioners concede that the approval of two federal agencies was necessary before the Whitney program could be put in effect, i.e., the Office of the Comptroller of the Currency and the Federal Reserve Board. (Whitney-Jefferson brief, p. 7; Saxon brief, p. 20). It is the actions taken by the Comptroller which are at issue in the instant case and about which *Amicus* is concerned. These actions, by his own affidavits (R. 41-48, 310), consisted of the following:

A.) He advised a national bank how by the use of its own funds it might evade the branch banking regulations he was charged by law with enforcing. (R. 41-48).

B.) He approved the investment by Whitney-New Orleans of its funds in the stock of a Louisiana bank holding corporation for its own account. *Amicus* submits there is no authority of any kind which would justify such an investment by a national bank of its funds. (12 U.S.C. § 24).

C.) The Comptroller approved the organization and chartering of a new national bank, Crescent City National Bank, which was characterized by Governor Robertson of the Federal Reserve Board as a "phantom" bank. The Comptroller knew that Crescent City would never accept the funds of depositors, would never make any loans, would never handle any trust

accounts, and in fact would never open its doors to the public for banking business of any kind. The approval of Crescent City by the Comptroller was given with the knowledge that it was to be the predetermined means by which Whitney-New Orleans was to convert itself into a subsidiary of a bank holding company, which holding company it had spawned with its owns funds. Certainly this is not a "legitimate" object for which the Comptroller should charter a national bank. (12 U.S.C. § 27).

D.) He approved the consolidation or merger of Whitney-New Orleans into Crescent City (the phantom bank) with the bold assertion that the consolidation was "in the public interest" (R. 34). He knew full well that this was to be nothing more than a link in the illegal chain by which Whitney-New Orleans, the largest bank in the State of Louisiana, sought to establish additional banking facilities in Jefferson Parish.

E.) Finally, the Comptroller approved the organization of a proposed new national bank in Jefferson Parish, which entity constituted the ultimate step in the scheme to establish a Whitney banking office in Jefferson Parish. Before the Comptroller could add the last link to the illegal chain by issuing the required certificate of authority for Whitney-Jefferson to operate as a national bank, he was enjoined by the District Court in the instant case.[1]

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[1] It is interesting to note that the Comptroller at first voluntarily withheld the issuance of the Certificate for a short time after the commencement of this suit; however, he later advised respondents through counsel that he would no longer delay issuance of the Certificate. Whereupon, the District Court granted respondents request for a temporary restraining order. (R. 182, 191)

The foregoing dramatic series of events clearly indicates the Comptroller's deep involvement in the Whitney scheme to evade federal and state bank branching restrictions and illustrates the *ultra vires* nature of his action. The Comptroller has knowingly permitted the use of his office to foster and encourage a scheme admittedly designed to destroy the very law he is sworn to enforce. This is a flagrant abuse of the discretion vested in the office of the Comptroller of the Currency. *Amicus* respectfully submits that the law is clear that the Comptroller has no discretion to issue a certificate of authority that would authorize the unlawful operation of a bank. *Wayne Oakland Bank* v. *Gidney*, 252 F. 2d 537 (6th Cir. 1958) *cert. denied*, 358 U.S. 830; *Commercial State Bank of Roseville* v. *Gidney*, 175 F. Supp. 770 (D.D.C. 1959) *aff'd.* 278 F. 2d 871 (D. C. Cir. 1960).

II. THE LOUISIANA STATUTE IS VALID AND CONTROLS OPERATION OF BANK HOLDING COMPANIES WITHIN THE STATE.

The Court of Appeals for the District of Columbia Circuit sustained the injunction granted by the district court on the ground that it violated existing federal law (12 U.S.C. § 36(c)). It was not necessary for it to consider the holding of the district court that the completion of the Whitney scheme also was prohibited by Louisiana Act 275 of 1962 (codified as LSA 6:1001, et seq.). However, recognizing that Act 275 is an additional bar to the completion of the Whitney scheme, petitioners have made a frontal assault on the statute by asserting that it violates both the Supremacy Clause[2] and the Fourteenth Amendment of the Con-

[2] Art. VI, cl. 2.

stitution of the United States. *Amicus* would like to discuss both of petitioners' charges in detail.

A. Section 1003 (5) Does Not Violate the Supremacy Clause of the Federal Constitution

Petitioners assert that L.S.A. R.S. 6:1003 (5) offends the Supremacy Clause because it is in conflict with federal banking legislation which preempts the field of the chartering and organization of national banks.

It is clear that Congress can pass a regulatory statute in an area of its competence without preempting the field and superseding all state law in the area. For example, in the labor field, Congress specifically authorized unions and management to enter into union shop contracts if they desire.[3] However, in so doing Congress specifically reserved to the states the right to pass "right to work" legislation if the state feels such legislation is desirable.[4] Therefore, the question in the instant case is simply whether Congress, by the passage of the Bank Holding Company Act of 1956, intended to exercise the full extent of its powers. *Amicus* contends that Congress specifically expressed its will that the states should not only be able to regulate bank holding companies and their subsidiaries,

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[3] Labor Management Relations Act (Taft Hartley Act) § 8(a) (3), 61 Stat. 140 (1947), 29 U.S.C. § 158 (a)(3) (1958).

[4] Labor Management Relations Act (Taft Hartley Act) § 14(b), 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

but that if a state so desired it could lawfully prohibit such companies.

The District Court in the instant case held that Section 7 of the Bank Holding Company Act of 1956 reserved to the states the power to prohibit or restrict bank holding companies within their borders. The pertinent part of Section 7 reads:

> Sec. 7. The . . . Act . . . shall not be construed as preventing any state from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof.[5]

The holding of the District Court is all the more persuasive when Section 7, set out above, is read in conjunction with Section 11 of the same Bank Holding Company Act of 1956. The pertinent part of Section 11 reads:

> Sec. 11. Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of *existing law*. . . . (emphasis added)[6]

The unambiguous language of these two sections leaves no doubt as to the intent of Congress.

Section 7 defers to the sovereign power of a state to control bank holding companies under "powers and jurisdiction *which it now has*", recognizing that ten states, at the time the Bank Holding Company Act was passed, had existing legislation regulating, restricting and even *prohibiting* bank holding companies.

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[5] 70 Stat. 138, 12 U.S.C. § 1846.

[6] 70 Stat. 146, 12 U.S.C. note to § 1841.

Some of these state statutes go back to 1915 and will be described shortly (R. 408). Section 11 flatly states that nothing in the Act is to be construed as giving approval for any act, action, or conduct "which is or has been or may be in violation of *existing* law." Because Congress did *not* restrict the clause to existing *federal* law, and because Congress was aware that some states prohibited bank holding companies altogether, it is evident that Congress intended nothing in the Act to legalize bank holding company operations in states that prohibited them. Section 7 also reserves to any state "powers and jurisdiction which it . . . *may hereafter have* with respect to . . . bank holding companies . . .", indicating that Congress expected that states in the future would enact laws regulating bank holding companies. In fact, 10 states enacted restrictive or prohibitory legislation *after* the Act was adopted in 1956.[7]

It is apparent at once that if this Court should hold the Louisiana statute invalid or inapplicable in the instant case, 19 state laws currently restricting or prohibiting holding companies, 10 enacted before the Act was passed[8] and 10 afterwards, would have doubt cast upon their validity. The resulting confusion would be extremely disruptive of existing accommodation between federal and state banking regulation.

Continuing with a review of the Act itself, we find that for Congress to defer to the states in the field of

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[7] R. 406-407 shows 8 States—Fla., Ind., Kan., La., Mass., N.J., N.Y., Pa.; in addition in 1963 Neb. outlawed bank holding companies, Neb. Rev. Stat. § 8-901 to 904 (1963 Cumm. Supp.) and N.H. severely restricted their operation, Laws of New Hamp., ch. 188 (Jan. Sess. 1963).

[8] S. Car. had an existing statute in 1956, later repealed.

bank holding company regulations is not unusual. In two other provisions Congress recognizes state authority. In Section 3(b)[9] when a state bank is sought to be acquired by a holding company, "the views and recommendations of the . . . State supervisory authority . . . may be submitted." If "the . . . State supervisory authority . . . disapproves the application in writing . . .", a hearing is *required* to be held. Such a hearing brings into operation the Administrative Procedure Act under which certain procedural rights are afforded to the parties. Further, Section 3(d)[10] provides that a bank holding company cannot expand across state lines into another state unless that other state "specifically authorized" by its statute holding company acquisition of a bank within its borders.

Section 7, on its face, especially when read in conjunction with the other sections discussed above, shows that Congress intended the states to have the right to be more restrictive in controlling bank holding companies or even to prohibit them altogether. However, assuming *arguendo* that some ambiguity exists in the language of Section 7, its legislative history makes the intent quite clear beyond cavil.

As stated earlier, *Amicus* had urged Congress to adopt legislation controlling holding companies for a period of 14 years before adoption of the Act of 1956. There had been many hearings in both the House and the Senate, culminating in final hearings on the eve of

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[9] 12 U.S.C. § 1842(b).

[10] 12 U.S.C. § 1842(d).

consideration of the bills in 1955.[11] When it became clear that the Congress, and the Federal Reserve Board on whom Congress depended for technical advice, did not favor a law prohibiting or freezing bank holding companies but rather one controlling them, *Amicus* urged that the states retain the right to restrict or prohibit bank holding companies in the manner they felt best suited their needs. Congress and the Board readily agreed with this position. Indeed, the history of bank legislation in Congress consistently has followed the policy that each state is best able to judge for itself the type of banking structure suited to its peculiar economy. And Congress in enacting federal bank legislation has always observed this concept. In fact, Congress was persuaded to observe states rights in this matter because 10 states already had restrictive or prohibitory legislation concerning bank holding companies on their books at the time Congress was considering the bills in 1955 and 1956. Congress also wished to be consistent in its longstanding policy of maintaining equality between national and state banks.

As an example of the concern Congress felt over how best to preserve the states' power to regulate holding companies within their borders, the Chairman of the Senate Banking and Currency Committe, Senator Robertson of Virginia, stated on the floor of the Senate during consideration of the bill in 1956:

> "It should be noted that another provision of the Senate bill expressly preserves to the States their

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[11] *Control and Regulation of Bank Holding Companies, Hearings Before the House Committee on Banking and Currency*, 84th Cong., 1st Sess. (Feb. 28 to March 9, 1955); *Control of Bank Holding Companies, Hearings Before a Subcommittee of the Senate Committee on Banking and Currency*; 84th Cong., 1st Sess. (July 5 to 12, and 14, 1955).

present authority over bank holding companies within their respective borders. Therefore, each state may, within the limits of its proper jurisdictional authority, enact legislation to regulate bank holding companies. Mr. President, *as an example of the type of legislation the States may enact,* I ask unanimous consent to have printed in the Record the text of a bill recently passed by the Georgia legislature." (Emphasis supplied)[12]

Senator Robertson was speaking of Section 8 of S. 880[13] which finally became Section 7 of the Act, set out above, without change except that the year 1955 stated in the bill became 1956.

Senator Robertson referred specifically to the existing Georgia statute as an example of the jurisdiction a state "now has", and, although the other 9 states having existing laws were not mentioned, it must be assumed that Congress had them in mind. A summary of all these existing state acts follows:

Georgia—(*Ga. Code Ann.* § 13-201.1(e), 13-207 enacted February 27, 1956 restricting existing bank holding companies and prohibiting new ones.)

Illinois—(*Ill. Stat. Ann.* ch. 16½, § 71-76, enacted 1955, providing that a company cannot acquire more than 15% of the stock of 2 or more banks. The 1960 amendment, ch. 32, § 157.5(g) now prohibits holding companies from organizing and severely restricts those existing.)

Kentucky—(*Ky. Rev. Stat. Ann.* § 297.030(2), (3) enacted 1955 restricting ownership of bank stock by holding company to 50%.)

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[12] 102 Cong. Rec. 6752 (1956), see text of Georgia Act R. 409.

[13] Senate Hearings *supra*, n. 11, p. 4.

Michigan—(*Mich. Stat. Ann.* § 21.10(i) enacted 1935 prohibiting formation of bank holding company.)

Mississippi—(*Miss. Code Ann.* § 5196, 5197, 5235, enacted 1934 prohibiting formation of holding companies without consent of State Comptroller.)

Oklahoma—(*Okla. Const.*, art. 9, § 41; *Okla. Stat.* tit. 79, § 31 enacted 1951 prohibiting bank holding companies.)

South Carolina—(*S.C. Code* § 12-77 enacted 1940 restricting amount of bank stock which can be owned by a holding company. Since repealed.)

Vermont—(*Vt. Stat. Ann.*, tit. 11, § 131 enacted 1916 controlling bank holding companies.)

Washington—(*Wash. Rev. Code.* tit. 30, § 30.04 enacted 1933 restricting amount of bank stock a holding company can own.)

West Virginia—(*W. Va. Code Ann.* ch. 31, § 3220, enacted 1955 prohibiting bank holding companies.)

When the hearings before the Senate Committee were being conducted, Governor Robertson of the Federal Reserve Board whom Chairman Martin asked to testify,[14] replied to questions of Acting Chairman Frear as follows:

> *Senator Frear.* You feel holding company jurisdiction should be governed and *controlled by the State legislatures* rather than by any Federal agency, especially your Board?
>
> *Mr. Robertson.* No, I do not. I say that the States ought to have the right to treat them differently from the way the Federal Government

[14] Senate Hearings, *supra* n. 11, p. 48.

does; but the fact that there are no laws today in the States which are adequate to meet this sort of problem, necessitates Federal legislation. However, *the legislation should permit the States to have more severe restrictions, if they wish;* but if they wish they ought to speak specifically as to holding companies and not apply laws which they have enacted relating to a different type of situation.

Senator Frear. How do you and the members of your Board feel regarding the jurisdiction of the State legislatures in controlling or regulating bank holding companies? Do you prefer that it be done by the State legislatures only in the absence of statutes now existing? Is this your opinion? Would you recommend that the State legislatures, or would it be your opinion that the State legislatures should take some action along this line?

Mr. Robertson. In my opinion, *the States should be free to deal with it* and I would like to see them deal with it, but the fact that there is not any legislation makes it *essential that there be Federal legislation in the meantime.*

* * * * * * * * *

Senator Frear. You think that section is quite all right?

Mr. Robertson. Oh, I think *they should have the right to enact more severe legislation, or any kind of legislation that they desire.*[15] (Emphasis supplied)

In the House hearings on the same bill with exactly the same provision for reservation of rights to states, Chairman Martin stated:

"In the first place, there is nothing in present law which restricts the ability of a bank holding com-

[15] *Id.* at 48, 49.

pany to add to the number of its controlled banks. Consequently, there can well be situations in which a large part of the commercial banking facilities in a large area of the country may be concentrated under the management and control of a single corporation."[16]

and that problem was not being

"[M]et by present law and cannot effectively be dealt with by the States *alone*."[16] (Emphasis supplied.)

The sense of the hearings in the Senate, whose concept became the 1956 Act, was that while nationwide control was needed immediately, the states should be free to supplement and strengthen this control to the extent each saw fit. In fact, the Comptroller of the Currency himself approved this concept. In the hearings before the House in a section by section commentary on the bill in 1955 the Comptroller stated: "Section 8. Reservation of rights to States: Satisfactory."[17] Following the hearings, the respective committees reported on the provision for reservation of rights to States as follows.

The House Committee report reads:

"RESERVATION OF RIGHTS TO STATES

The bill, in a clear-cut statement, would preserve all the rights which States, now or hereafter, may have to regulate banks or bank holding companies."[18]

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[16] House Hearings, *supra* n. 11, p. 13-14.

[16] *Id.* at 13.

[17] *Id.* at 132.

[18] H.R. Rep. No. 609, 84th Cong., 1st Sess., p. 22 (May 20, 1955); H. Misc. Rep., Vol. 3.

The Senate report reads:

> "*Section 7.*—This section makes clear that there is reservation of rights of any State for exercise of such powers as it has or may hereafter have with respect to banks, bank holding companies, and the subsidiaries thereof in a manner *more restrictive* than the provisions of this bill." [19]

Louisiana was therefore within its clearly reserved rights in enacting Act 275 which explicitly prohibits the formation of any bank holding companies within its borders. The Legislature adopted this Act by an overwhelming vote of 80 to 16 in the House and 28 to 7 in the Senate (R. 415). The *Record* discloses that the bill was treated as emergency legislation, and, to insure that its state policy against bank holding companies would be carried out at once, the Legislature included in the Act Section 1003(5).

The petitioners seem to concede that Congress has not preempted the entire field of the regulation of bank holding companies; however, they still contend that Congress has preempted the field of the "chartering and organization of national banks." A short answer to this contention is that Congress recognized that a number of states had legislation which prohibited, restricted the expansion of, or regulated bank holding companies--some of these statutes having a direct effect on the "organization and chartering" of national banks. For example, the very Georgia statute which was read into the *Congressional Record* by Senator Robertson as an example of the type of legislation states could enact, directly affects the organiza-

[19] S. Rep. No. 1095, 84th Cong., 2d Sess., found in Vol. 2, 1956 *U.S. Code Cong. to Admin. News*, 2504.

tion and chartering of national banks. This Georgia statute, which carried heavy penalties, forbade any expansion of a bank holding company system beyond two banks. Therefore, it is obvious that Congress knew that if a bank holding company attempted to acquire or organize a new *national* bank chartered in Georgia, which would be the third bank in the system, it would violate Georgia state law. It is clear Senator Robertson intended the Georgia statute to be enforceable; it is also clear it directly affects the "chartering and organization" of national banks. In fact it defines the term "bank" to include "any national or state bank" (R. 409).

The same contention petitioners make concerning the Supremacy Clause was made before the Supreme Courts of Illinois and New Hampshire and rejected.[20]

In attempting to dilute the reservation of rights to states in the Bank Holding Company Act, petitioners emphasize a paragraph of Senate Report No. 1095[21] in a way which distorts its true meaning. *Amicus* submits that proper emphasis should be made as follows:

> "In order to clarify the legislative history of Section 7, the committee wishes to emphasize that this section does not grant any new authority to States over national banks. The purpose of the section is to *preserve to the States* those powers which they now have in our dual banking system. *It is always of uppermost importance in legisla-*

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[20] Braeburn Securities Corp. v. Smith, 15 Ill. 2d 55, 153 N.E.2d 806 (1958), *appeal dismissed for want of a substantial federal question*, 359 U.S. 311; Opinion of the Justices of New Hampshire, 151 A.2d 236 (1959). These two cases are discussed in detail in appellees' briefs.

[21] Whitney-Jefferson brief, p. 47; Comptroller's brief, p. 74.

tion of this nature to preserve the dual system of National and State banks, and section 7 must be viewed in that light." (Emphasis added)

The above part of the Senate Report, when read together with another portion, leaves no doubt that in holding company regulation, as in branching, the State law is to be respected.

> "In any event, another provision of this bill [now Sec. 7] expressly *preserves to the States a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders* than the Federal authorities can be or are under this bill. Under such a grant of authority, each State may, within the limits of its proper jurisdictional authority, be *more severe* on bank holding companies as a class than (1) this bill empowers the Federal authorities to be or (2) such Federal authorities actually are in their administration of the provisions of this bill. In the opinion of the committee, this provision *adequately safeguards States' rights as to bank holding companies.*"[22] (Emphasis supplied.)

We note particularly that this portion of the report says that states may be more restrictive and more severe "regarding the *formation* . . . of bank holding companies within their restrictive borders than the federal authorities can be or are under this bill." In the instant case the Louisiana statute broadly prohibits the formation of any bank holding company anywhere in the state, and specifically forbids "any bank holding company or subsidiary thereof to open for business. . . ."[23] As demonstrated, Congress did not preempt the field, so there can be no violation of

[22] S. Rep. No., *supra* n. 18, p. 2492.

[23] 6 La. Rev. Stat. § 1003(5).

the supremacy clause of the federal constitution. *First National Bank* v. *California*, 262 U.S. 366, establishes the test to be applied under the Supremacy Clause. It is, simply: Does the state law conflict with, or frustrate the purpose of the federal law? The discussion above concerning § 7 and § 11 of the National Bank Act of 1956, together with their legislative history, illustrates that in no manner does the Louisiana statute conflict with or frustrate the purposes of federal law. Therefore, it does not contravene the Supremacy Clause of the Constitution of the United States.

B. Section 1003 (5) Does Not Violate the Fourteenth Amendment

The petitioners contend that the "class" of banks covered by the Louisiana statute in question has only one member: Whitney-Jefferson. They then assert that the Louisiana statute violates the Equal Protection Clause of the Fourteenth Amendment on the ground that it constitutes special legislation. The short answer to this is that the statute in question extends to the whole class of holding companies throughout the State of Louisiana—that may be established now or at any time in the future. The application of Section 1003 (5) to Whitney-Jefferson is merely an incidental effect of making the policy determination against holding companies immediately operative.

It is settled law that it is only "invidious discrimination" which offends the Equal Protection Clause of the Federal Constitution. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. The *Williamson* case holds that all that is required for a state statute to be upheld under the equal protection clause is that it must bear a reasonable relation to a constitutionally per-

missible objective. The Court in *Williamson* emphatically stated:

> The day is gone when this court uses the due process clause of the 14th Amendment to strike down state laws, regulatory of business industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. See *Nebbia* v. *N. Y.*, 291 U.S. 502; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379; *Olsen* v. *Nebraska*, 313 U.S. 236; *Lincoln Union* v. *Northwestern Co.*, 335 U.S. 525; *Daniel* v. *Family Insurance Co.*, 336 U.S. 220; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421. We emphasize again what Chief Justice Waite said in *Munn* v. *Illinois*, 94 U.S. 113, 134: "For protection against abuses by legislatures the people must resort to the polls, not to the courts." [24]

To support their special legislation contention, petitioners cite the case of *Cotting* v. *Kansas City Stockyards Co.*, 183 U.S. 79, 102-103, 112, 114-115. *Cotting* holds that when a statute only affects *one of a class* of businesses it is unconstitutional under the Equal Protection clause of the Fourteenth Amendment. In the *Cotting* case the Kansas statute was unconstitutional because it applied *only* to the Kansas City Stockyards Company and not to other corporations engaged in like business in the State of Kansas. However, in the instant case, the Louisiana statute applies equally to *all* bank holding companies that may be organized anywhere in the state. It is not directed towards a specific company but to a well-defined type of banking structure. If the law in the instant case applied to some holding companies and not to other holding companies, then its validity might

[24] *Id.* at 488.

be doubtful; but, here it applies alike to all holding companies and their subsidiaries. The petitioners cite many cases to support the proposition that even if legislation is constitutional on its face, it will fall if it is shown to be directed towards a discriminatory or otherwise unconstitutional objective.[25] But the fact of the matter is that the Louisiana statute in question is not directed towards a discriminatory or unconstitutional objective. Federal law specifically authorizes Louisiana to regulate or prohibit bank holding companies and the statute in question applies to all state incorporated holding companies and their subsidiaries. It has been clear since *Munn* v. *Illinois,* 94 U.S. 113, 132, that states have the power to legislate against commercial practices they believe to be injurious in their internal business affairs. And all that is required is that the statute have some rational relation to a practice that could be reasonably found to be injurious to local business conditions.

Lindsey v. *Natural Carbonic Gas. Co.,* 220 U.S. 61, 78, sets up the tests to be employed in weighing challenged state statutes under the equal protection clause of the Fourteenth Amendment:

> The rules by which this contention must be tested, as shown by repeated decisions of this court, are these:
>
> 1. The Equal Protection Clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits the exercise of a wide scope of discretion in that regard, and voids what is done only when it is without any reasonable basis and therefore is purely arbitrary.

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[25] Whitney-Jefferson brief, p. 54.

2. A classification having some reasonable basis does not offend against the clause merely because it is not made with mathematical nicety or because in fact this results in some inequity.

3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification of such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel* v. *Wilson*, 204 U.S. 36, 41; *Louisville & Nashville R.R. Co.* v. *Melton*, 218 U.S. 36; *Ozen Lumber Co.* v. *Union County Bank*, 207 U.S. 251, 256; *Munn* v. *Illinois*, 94 U.S. 113, 132; *Henderson Bridge Co.* v. *Henderson City*, 173 U.S. 592, 615.

It cannot be reasonably contended that the police power of a state does not extend to the regulation or prohibition of bank holding companies which are created by the corporation statutes of the state. Since 1915, states have regulated or prohibited bank holding companies and no court has ever intimated that such regulation is not within the inherent police power of a state.

The petitioners also contend that the Louisiana statute violates the Due Process Clause of the Fourteenth Amendment. Their contention seems to be that the statute deprives Whitney-Jefferson of property without due process. With regard to this contention, the recent decision of this court in *Ferguson* v. *Skrupa*, 372 U.S. 726 (April 22, 1963) is dispositive. The Kansas state statute being challenged as unconstitutional in the *Ferguson* case made it illegal to operate a debt

adjustment agency within the state. The plaintiff had been in the debt adjustment business for several years before the statute was passed, and its obvious effect was to put him out of business. He contended that his business was a useful and desirable one and that his activities were not inherently immoral or dangerous or in any way contrary to the public welfare and therefore could not be absolutely prohibited. The Supreme Court flatly held that Kansas has the right to legislate over business activities that are determined to be contrary to the public welfare. The Court stated:

> The doctrine that prevailed in *Lockner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this court stated in an unanimous opinion in 1941, "We are not concerned . . . with the wisdom, need, or appropriateness of the legislation." Legislative bodies have broad scope to experiment with economic problems, and this court does not sit to "subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause in the Fourteenth Amendment was intended to secure." It is now settled that states "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." *Id.* at 730, 731.

* * * * * * * * *

> We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. . . . We refuse to sit as a "super-legislature to weigh the wisdom of legislation", and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory." Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas . . . statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas. *Id.* at 731, 732.

Just as the State of Kansas determined that the debt adjustment business was inimical to the public welfare of that state, so the State of Louisiana can reasonably conclude that the bank holding company business is contrary to its welfare. This policy decision of Louisiana is not as extreme in its effect as is the statute in the *Ferguson* case. It must be remembered that in Louisiana, Whitney-Jefferson had not yet engaged in the banking business; while in Kansas debt adjustment businesses had been operated for many years.

The appellants complain of the eleventh-hour timing of Subsection 5 of the Louisiana statute. We submit that the State of Louisiana, having determined not to permit holding companies, had the right to act promptly and to make sure by appropriate language that no holding company would commence operation in the state. That timing and prompt action is appropriate

in these matters is illustrated by the decision in *Commercial State Bank of Roseville* v. *Gidney*, 175 F. Supp. 770 (D.D.C. 1959) *aff'd* 278 F. 2d 871 (D.C. Cir. 1960). There Judge Youngdahl in enjoining the comptroller from issuing a certificate of authority for a new branch stated:

> "Thus, if plaintiffs have no adequate remedy once the certificate issues—and, as discussed below, it does not appear as if they do—*relief is now or never*." (Emphasis supplied.)

When the State of Louisiana discovered that a holding company system was about to be launched by the largest bank in the state, it was faced with a "now or never" decision. It decided by a resounding vote (R. 415) to bar the formation of any holding company in the state starting at that moment. Having made this emphatic decision, it would be unthinkable that the comptroller should be able to force a holding company system upon the people of Louisiana.

III. APPROVAL OF THE WHITNEY SCHEME WILL DISRUPT FEDERAL BANKING POLICIES

Affirmance of the decisions of the courts below will uphold two longstanding federal policies: (a) to maintain competitive equality between national and state banks, and (b) to preserve competition and to restrain concentration in the field of banking.

The central issue here is whether a *holding company system* is to be born contrary to the wishes of the people of Louisiana and contrary to a federal-state statutory program which for decades has recognized that the people in each state are best able to judge the type of banking structure suitable to their economic needs. If the people in any state decide that they want a state-

wide system of independently owned banks with no branches and no holding companies, and thus no concentration of control, they are entitled to have such a banking structure under federal law. This is not a mere ideal but a reality under the delicately balanced accommodation of present federal and state banking laws which permit national and state banks to operate side by side and to compete on an equal plane.

This case presents a crucial test of this delicately-balanced dual system of banking. The federal action threatened to be taken, and avowed by the Comptroller to be taken if the injunction is lifted (R. 310), would, if upheld by this court, constitute the first major upset in this balance.

Court approval of the device used by petitioners in this case would be a blow to the avowed Congressional purpose of preventing unhealthy concentration of control of commercial credit, and would ultimately result in a reduction of available sources of supply of credit.

A. Federal Policy of Accommodation To State Banking Regulation Will Be Frustrated If the Whitney Scheme Is Approved.

The tradition of accommodation of federal laws regulating banking to state laws grew out of a necessity of preventing a collision between the two banking systems, out of which one might gain dominance over the other. This does not mean that national and state *banks* are not to compete vigorously with each other, but rather that the authorities governing the two *systems* should not be brought to the point of vying with each other for supremacy.

From the beginning of constitutional government in this country there has never been any serious doubt as to the sovereign rights of the states to charter banks, but this was not clear as to the right of the federal government. The First Bank (1791-1811) and the Second Bank (1816-1832) of the United States were the subjects of continual controversy. Their opponents contended there was no constitutional authority for the federal government to charter banks. President Jefferson opposed the creation of the First Bank; and President Jackson vetoed the bill to renew the charter of the Second Bank in 1832, pointing out that there was considerable doubt in Congress as to its constitutionality. He noted that while two previous Congresses had decided in favor of a national bank two other Congresses had at other times decided against it.

This same doubt existed in 1863 when Congress adopted the National Bank Act which passed the Senate by only two votes—and then only after strong appeals that the Act was necessary to finance the federal army in the Civil War. With these tenuous beginnings, the national banking system was launched in 1863 to operate side by side with the state banking system which by that time had gained considerable strength.

After launching the national system, there were various proposals for federal legislation to make national banks predominant or even supreme. Congress has consistently rejected such proposals; and, on the contrary, has continued to adopt legislation designed to avoid conflicts between the systems, to encourage harmony, and to maintain competitive equality. The states have done likewise.

The most important feature of the dual system is the principle of competitive equality between national and state banks as to branching, achieved by use of state law as the standard for both national and state banks. Congress has adopted state law as the measuring stick for the establishment of branches by national banks.[26] In various other areas, Congress has used state law as a guide, for example, as the measure of allowable capitalization of new national banks[27] as to interest rates on loans,[28] as to securing public money deposits,[29] as to trust powers,[30] as to conversion of a national bank to a state bank,[31], as to interest on demand deposits,[32] and as to taxation of national banks.[33]

When Congress saw that bank holding company operations were designed to evade and circumvent state branching laws and felt it necessary to regulate these holding companies for the same reason that branching is regulated—to prevent undue concentration—it pondered the necessity for federal and state accommodation in this new area of regulation. It recognized that bank holding companies were creatures of the corporation laws of the various states and would continue to be so, and that the states should have the right to decide to what extent these corporations were to be per-

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[26] 44 Stat. 1228 (1927), 12 U.S.C. § 36 (1962).

[27] 31 Stat. 48 (1900), 12 U.S.C. § 51 (1935).

[28] 48 Stat. 191 (1933), 12 U.S.C. § 85 (1935).

[29] 31 Stat. 1448 (1901), 12 U.S.C. § 90 (1950).

[30] 76 Stat. 668 (1962), 12 U.S.C. § 92a(a) (1962).

[31] 64 Stat. 456 (1950), 12 U.S.C. 214c (1954).

[32] 48 Stat. 181 (1933), 12 U.S.C. § 371a (1935).

[33] 13 Stat. 111 (1864), 12 U.S.C. § 548 (1926).

mitted to organize and operate within their borders. Just as state laws are guides in the operation of federal law on branching, so Congress determined that the states must be permitted the right to restrict or prohibit bank holding company operations.

In the matter of branching, 15 states restrict bank branching for state banks and 15 prohibit branching entirely (R. 412). If all of the states were to outlaw branching, as 15 now do, *no national bank could thereafter establish a branch regardless of the will of the Comptroller of the currency.* Likewise, in considering the right of the state to set the standards as to bank holding companies, it was recognized and accepted by all of the interested federal regulatory agencies, including the Comptroller, and the committees of both the House and Senate, that the states must be free to decide for themselves whether holding companies are to be permitted within their borders and, if so, to what extent. It was recognized and reported on the floor of the Senate that some state laws going back to 1915 outlawing or controlling bank holding companies were on the state statute books and must be respected. Thus, Congress again accommodated its regulation to varying state laws.

It is to be recalled at this point that in 1955, during the hearings on the eve of adoption of the Bank Holding Company Act of 1956, Congress recognized that the rapid growth of bank holding companies was considered dangerous for the economy and required immediate controls. The Federal Deposit Insurance Corporation wanted a death act; the House had voted a freeze bill designed to stop expansion of existing holding companies and to outlaw the formation of new ones; and the Senate, guided by the Federal Reserve

Board, felt that Federal restraint, supplemented by State laws, would be adequate.

The Senate version became the present Act and in urging it representatives of the Federal Reserve Board indicated that the states might not act quickly enough to control the rapid pace of holding company operations and that in the meantime an overall Federal damper was necessary. Congress recognized again that a banking structure needed in the densely populated and highly industrialized area of the East Coast is far different from that required in a prairie state.

The genius of this accommodation policy is that no substantial privilege is given to banks in one system over those in another while competing in the same geographical area; situations involving conf.. ts of law are reduced to a minimum; over-regulation in both systems is restrained; and the privilege of a bank in one system to freely convert to the other provides an inducement for improvement and modernization in each system. With diffusion of supervisory authority among the 50 states and the federal government, more freedom in the economy is assured than would be the case with a monolithic system of banking.

In short, the courts below have in effect said that the Comptroller shall not be permitted to throw the switch which will set into motion the machinery of the first holding company system to appear on the scene in Louisiana. If this Court should reverse it would not only disregard the plain will of the people of Louisiana not to have holding companies and not to have branching beyond parish lines, but would disrupt a delicately balanced sharing of regulation by federal and state authorities which has been carefully maintained by Congress since the beginning of this century.

B. Federal Policy of Preventing Concentration of Banking Will Be Undermined By Approval of the Whitney Scheme.

The history of federal bank legislation shows that from the beginning Congress has intended to maintain in this country a competitive banking system as the best means of serving a competitive economy. It has pursued this policy, in the same manner as in the commodity field, by essentially antitrust type of legislation. The Bank Holding Company Act of 1956 restrains holding company concentration of banking power for "the public interest, and the preservation of competition in the field of banking."[34] It restricts expansion of these systems across state lines;[35] and makes clear that the Act does not replace but supplements federal and state antitrust laws.[36] The Bank Merger Act of 1960 controls mergers of both national and state banks by requiring the approving agency to "take into consideration the effect of the transaction on competition (including any tendency toward monopoly) . . . in the public interest."[37]

This Court on two occasions has recently underscored this national policy, noting

> that if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepeneurial system is threatened . . . unless competition is allowed to fulfill its role as an economic regulator in the banking industry[.]

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[34] 12 U.S.C. § 1842(c)(5).

[35] 12 U.S.C. § 1842(d).

[36] Sec. 11, 12 U.S.C. § 1841, n. 2.

[37] 12 U.S.C. § 1828(c).

> [And] that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization of governmental regimentation of large portions of the economy.[38]

In a later case, this Court observed that in banking "the elimination of significant competition . . . constitutes an unreasonable restraint of trade in violation of Section 1 of the Sherman Act."[39]

In both the Philadelphia and Lexington cases this Court found it necessary to reverse the Comptroller's approval of bank mergers.

The maintenance of competition in banking means fair competition in an open field. It means equality of opportunity between banks regardless of which governmental authority supervises them. It means that Whitney-New Orleans cannot be permitted to have a banking office located in an adjoining parish, controlled through the holding company device, when similar banking offices in that parish are denied to the plaintiff state banks by state law. The state banks in both parishes would be at a decided competitive disadvantage and Whitney-New Orleans would be able to increase its dominance of the market.[40]

Competition in banking, as presented by this case, exists at two levels. Competition at the level where each bank vies with the other for public business is

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[38] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 372.

[39] *United States* v. *First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 673.

[40] Whitney-New Orleans now controls almost 40% of all commercial bank deposits in Orleans Parish and over 30% of such deposits in the adjoining Jefferson Parish held by banks with main offices there. R. 8.

a healthy and desirable state of affairs which Congress, the Courts and most of the state legislatures foster and encourage. However, competition between national and state bank *systems* is quite a different matter. Neither should be permitted to dominate or overwhelm the other. The supervisory authority in one system should not so use his power as to give banks in his system substantial advantage over banks in the other system. As we have pointed out, the federal and state governments have equal rights to charter banks and, representing the same citizens, h~ long ago decided to share the field, not to seek advantages one over the other; and, at all times have observed the principle of equal competitive opportunity.

Returning now to the setting in which the 1956 Act was passed, we find that a state of urgency existed. The House Report states:

> "The time for action is now. We dare wait no longer, for already we are rapidly following the example of England whose many banks became the Big Five."[41]

The Senate Report states:

> "The dangers accompanying monopoly in this field are particularly undesirable in view of the significant part played by banking in our present national economy."[42]

The House report further states:

> "The need for immediate legislation which would . . . control the future expansion of bank holding companies . . . has been established to the complete

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[41] H. Rep. No. 609, *supra* n. 18, p. 2.

[42] S. Rep. No. 1095, *supra*, n. 19, pp. 2482-2483.

satisfaction of your committee. . . . Our National policy has aimed at protecting and fostering the growth of independent unit banks." [43]

The Senate report further stated that the Act would "require contemplation of the prevention of undue concentration of control in the banking field to the detriment of public interest and the encouragement of competition in banking. It is the lack of any effective requirement of this nature in present federal laws which has led your committee to the conviction that legislation such as that contained in this bill is needed." [44]

In the instant case, Whitney-New Orleans in our view already controls an "undue concentration," without being given the further reach it would have with its holding company. In the instant case Whitney-New Orleans controlled about 39% of the total commercial deposits and 44% of all individual, partnership and corporation deposits in the parish of Orleans; and it controls over 30% of all deposits held by all banks having head banking offices and facilities in the East Bank area. (R. 104) It is noted by comparison that this Court struck down a merger, approved by the comptroller, in which the resulting bank in Philadelphia would control 36% of all deposits in the competitive area.[45] Later, this Court struck down another merger, also approved by the comptroller, at Lexington, Kentucky where, before merger, one of the banks involved had 40.06% of all deposits.[46]

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[43] H.R. No. 609, *supra*, n. 78, p. 1, 2.

[44] S. Rep. No. 1095, *supra*, n. 19, pp. 2491-2492.

[45] *United States* v. *Philadelphia Nat'l Bank*, *supra*, n. 38.

[46] *Supra*, n. 39.

In a Report of the House Committee on Small Business, dated December 23, 1960, it is shown that there has been a steady trend of concentration of banking resources into fewer and fewer hands. It was found that as of the end of 1959, 66% of total banking assets in the United States were held by branch banks and holding company banks.[47] In a later study, the Senate Small Business Committee in 1962 found that in the previous 10 year period the total number of banks in the country had shrunk while the concentration of control of banking resources was proceeding at a rapid rate.[48]

At the hearings into the conduct of the office of the Comptroller, a distinguished economist drew a comparison between concentration of control of manufacturing companies with that existing in the banking industry. Dr. Lanzillotti stated:

> "While we have deplored the fact that the 200 largest manufacturing companies control 38 per cent of total U.S. output, as of 1962 the 200 largest commercial banks in the United States held 55 percent of total assets and deposits and 57 percent of total loans. This is a very high level of aggregate concentration—whether taken in relation to other sectors of the economy or on its face.
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> Moreover, concentration of control in banking has been increasing over the past decade due to (a)

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[47] Staff Report to the House Select Committee on Small Business, *Banking Concentration and Small Business*, 86th Cong., 2d Sess., p. 8 (Comm. Print 1960).

[48] Special Staff Report of the Board of Governors of the Federal Reserve System Submitted to the Senate Select Committee on Small Business, *Recent Developments in the Structure of Banking*, 87th Cong., 2d Sess. (Comm. Print, Jan. 5, 1962).

bank mergers and acquisitions, (*b*) the spread of bank holding companies, (*c*) the growth of chain banking, and (*d*) increasing interbank stockholder links and loans secured by stock in other banks. Some idea of the rather basic changes that have been taking place in the structure of banking is shown in table II."[49] (Conflict of Federal and State Banking Laws, *supra*, p. 32.)

He pointed out that such concentration adversely affects potential growth of small business.

"The availability of alternative sources of bank financing bears importantly on the preservation of competition in other sectors of the economy. The elimination of independent sources of loans and banking services generally by the apparent permissive approach of the banking agencies will adversely affect the interests and growth potential of small business."[50]

These hearings amounted to a review of the conduct of the office of the Comptroller and, after their publication, Chairman Patman of the House Committee summarized in part the findings. Chairman Patman's summary is included as Appendix B herein.

Amicus deplores this inexorable pace of concentration in banking and urges this Court to consider the practical economic effects of its decision in this case.

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[49] *Hearings Before the House Committee on Banking and Currency*, 88th Cong., 1st Sess., at 32 (April 30, May 1, 2, 3, and 6, 1963).

[50] *Id.*, at p. 40.

IV. CONCLUSION

Amicus Curiae respectfully submits, for the reasons stated, that the decree issued herein enjoining the Comptroller of the Currency from authorizing petitioner Whitney-Jefferson to engage in the banking business should be affirmed. *Amicus* further suggests that a reversal would ultimately adversely affect the thousands of banks that are members of this association as well as encourage monopolistic banking practices.

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